CHANG KOW CHIN

v.

KAMMALA KUMARASAMY & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-94-1996]
8 AUGUST 1997

CIVIL PROCEDURE: *Action - Limitation period - When cause of action arose - Infringement or threat of infringement of rights under agreement*

CIVIL PROCEDURE: *Pleadings - Striking out - Whether action contains point of law - Whether there is material to show reasonable cause of action*

In April 1976, the plaintiff entered into an agreement to purchase a piece of land from the defendants. The plaintiff had paid all the moneys due under the agreement except RM500 which was payable upon the issuance of a separate document of title. However, 19 years later the defendants had still not fulfilled their obligations under the agreement. The plaintiff commenced a writ action against the defendants and later filed a summons-in-chambers for specific performance (encl 8). Meanwhile the 2nd and 3rd defendants filed a defence which raised, *inter alia*, the issue of limitation. They also filed a summons-in-chambers (encl 15) to strike out the writ of summons on the ground that it did not disclose any reasonable cause of action.

Held:

[1] An action which contains a point of law, like the instant action, should not be struck off. Furthermore, there were materials to show that there was a reasonable cause of action in the statement of claim.

[2] The Limitation Act 1953 did not apply because the cause of action only arose on the date when there was an infringement or threat of infringement of the plaintiff's rights under the agreement.

[Dismissing encl 15 and allowing encl 8.]

Case(s) referred to:

Abu Bakar Hj Yusuf v. Mohamed Hamzah Hanapiah & Anor [1978] 2 MLJ 78 ***(refd)***

Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 ***(refd)***

Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors [1997] 2 CLJ 406 ***(refd)***

Ardeshir Mamma v. Flora Sassoon AIR [1928] PC 208 ***(refd)***

Ash v. Hutchinson & Co (Publishers) [1936] Ch 489 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1993] 4 CLJ 7 ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***

Byrd v. Nunn [1877] 5 Ch D 781 ***(refd)***

Chor Phaik Har & Ors v. Choong Lye Hock Estate Sdn Bhd & Ors [1996] 4 CLJ 141 ***(refd)***

Collette v. Goode [1878] 7 Ch D 842 ***(refd)***

Flint v. Brandon [1803] 8 Ves 159 ***(refd)***

Fox v. H Wood (Harrow) Ltd [1963] 2 QB 601 ***(refd)***

Gasing Heights Sdn Bhd v. Aloyah Abdul Rahman & Ors [1996] 3 CLJ 695 ***(refd)***

Green v. Sevin [1879] 13 Ch D 589 ***(refd)***

Harris v. Gamble [1878] 7 Ch D 877 ***(refd)***

Hassan v. Ismail [1970] 1 MLJ 210 ***(refd)***

Hii Teng Tuong Alphonsus v. Lok Min Wah & Ors [1995] 4 MLJ 259 ***(refd)***

Ibrahim Mohamad v. Ketua Polis Daerah Johor Bahru & Ors [1996] 5 MLJ 15 ***(refd)***

Itam Saad v. Chik Abdullah [1974] 2 MLJ 53 ***(refd)***

KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***

Lamare v. Dixon [1873] LR 6 HL 414 ***(refd)***

Lee Conservancy Board v. Button [1879] 12 Ch D 383 ***(refd)***

Lee Hoy & Anor v. Chen Chi [1971] 1 MLJ 76 ***(refd)***

Lee Sau Kong v. Leow Cheng Chiang [1961] MLJ 17 ***(refd)***

Lim Nyuk Chan v. Wong Sz Tsin [1964] MLJ 200 ***(refd)***

Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd [1983] 2 CLJ 104 ***(refd)***

Mohamed v. Ho Wai [1961] MLJ 7 ***(refd)***

Monk v. Bartram [1891] 1 QB 346 ***(refd)***

Nasri v. Mesah [1971] 1 MLJ 32 ***(refd)***

New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Oh Theresa v. Sia Hok Chai [1992] 1 CLJ 170 ***(refd)***

Ong Chat Pang & Anor v. Valiappa Chettiar [1971] 1 MLJ 224 ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 ***(refd)***

Paul Law Ung Hua & Anor v. Hong Wei Organisation Sdn Bhd [1996] 4 MLJ 489 ***(refd)***

Peck v. Russell [1923] 4 FMSLR 32 ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 CLJ 257 ***(refd)***

Pioneer Plastic Containers Ltd v. Commissioner of Customs and Excise [1967] Ch 597 ***(refd)***

Rutter v. Tregent [1879] 12 Ch D 758 ***(refd)***

S Manickam & Ors v. Ismail Mohamed & Ors [1997] 2 MLJ 90 ***(refd)***

Saih Tengku Nong [1964] MLJ 43 ***(refd)***

Shaik Zolkiffly Shaik Natar & Ors v. Majlis Agama Islam Pulau Pinang dan Seberang Perai [1997] 4 CLJ 70 ***(refd)***

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178 ***(refd)***
Skemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 MLJ 155 ***(refd)***
Smith v. Gamlen [1881] WN 110 ***(refd)***
Stickney v. Keeble [1915] AC 386 ***(refd)***
Tan Keat Seng, Kitson v. Kerajaan Malaysia [1996] 2 CLJ 722 ***(refd)***
Tan Swee Lan v. Engku Nik Engku Muda & Ors [1973] 2 MLJ 187 ***(refd)***
Teh Poh Wah v. Seremban Securities Sdn Bhd [1996] 4 CLJ 16 ***(refd)***
Tengku Jaafar Tengku Ahmad v. Karpal Singh [1993] 3 MLJ 156 ***(refd)***
Thorp v. Holdsworth [1876] 3 Ch D 637 ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 ***(refd)***
Veetak Enterprise Sdn Bhd v. The Kuala Lumpur Finance Bhd [1987] 1 MLJ 407 ***(refd)***
Venkatachalam Chettiar v. Arunasalam Chettiar [1953] MLJ 234 ***(refd)***
Wu Shu Chen v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 ***(refd)***
Yeo Long Seng v. Lucky Park (Pte) [1971] 1 MLJ 20 ***(refd)***
Yeo Siew Kiow v. Nyo Chu Alang & Anor [1997] 5 MLJ 313 ***(refd)***
Zaibun SA Syed Ahmad v. Loh Koon Moy & Anor [1982] 2 MLJ 92 ***(refd)***
Zakaria Mohamed Esa v. Dato' Abdul Aziz Ahmad & Ors [1985] 2 MLJ 222 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 9(1)
National Land Code 1965, s. 344
Rules of the High Court 1980, O. 18 rr. 13(3), 19(1)(a), O. 81
Specific Relief Act 1950, ss. 11(2), 18, 19, 20(1)(a), (c), 21, 26

Other source(s) referred to:
Halsbury's Laws of England, 3rd edn, vol 16, p 35

For the plaintiff - Goh Mey Foon; M/s Leng & Co
For the defendants - Mohd Azuan Abdul Rahman; M/s Balarajah & Co

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Malik Ishak J:

Facts And The Sequence Of Events

On 11 April 1976, the plaintiff entered into an agreement with Kumarasamy a/l P. Senginy, the first defendant – who has since died ("the deceased"), the second defendant and the third defendant for the purchase of a piece of land known as private lot no: 216 measuring approximately 5,000 square feet ("the portion of the said land") which forms part and parcel of a bigger portion of land in agricultural lease no: 305 of lot 2883 of the Mukim of Pulai ("the said land"). That private lot no: 216 was eventually and subsequently charged to private lot no: 220 as seen in exh. "CKC 1" of encl. 20. For convenience, all the three defendants are hereinafter referred to as "the vendors".

On 14 April 1981, the vendors entered into a joint venture agreement with Revathy Development (M) Sdn Bhd ("Revathy") wherein Revathy agreed to apply for the approval to the relevant authorities to change the category of the said land and to sub-divide the said land within 3 1/2 years from the date of the joint venture agreement.

On 6 May 1982, the plaintiff lodged a private caveat *vide* presentation no: 802/82 vol. 122 folio 66 on the said land and this can clearly be seen in exh. "CKC 2" of encl. 20.

On 15 October 1984, Messrs AKJ D'Cruz & Co, the former solicitors for the vendors had written to Messrs A.L. Looi, the former solicitors for the plaintiff asking the plaintiff to remove the private caveat in order to facilitate the subdivision and the conversion of the said land and undertook to protect the plaintiff's interest and these facts can be gleaned from exh. "CKC 3" of encl. 20.

On 14 March 1985, the plaintiff agreed in principle to remove the private caveat to facilitate the subdivision and conversion of the said land as can clearly be seen in exh. "CKC 4" of encl. 20.

On 1 October 1985, Messrs Balarajah & Company, the current solicitors for the vendors, wrote to Messrs A.L. Looi to convey the message that they have filed an originating summons no: 507 of 1985 for, *inter alia*, declaration that the joint venture agreement is terminated through effluxion of time ("the said action") and this can clearly be seen in exh. "CKC 5" of encl. 20.

On 29 December 1986, the plaintiff acted prudently and lodged another private caveat *vide* presentation no: 3354/86, jilid 252, folio 84 on the said land as reflected in exh. "CKC 7" of encl. 20.

On 3 December 1989, Messrs Leng & Co, the current solicitors for the plaintiff, wrote to Messrs Balarajah & Company to enquire as to the status of the said action as can be seen in exh. "CKC 9" at p. 34 thereof of encl. 20.

On 6 December 1989, Messrs Balarajah & Company replied and informed that the said action was converted into a writ. This piece of evidence can be gleaned at p. 35 of exh. "CKC 9" of encl. 20.

On 11 February 1992, Messrs Leng & Co wrote once again to Messrs Balarajah & Company to enquire as to the status in respect of the application for subdivision and conversion as reflected at p. 36 of exh. "CKC 9" of encl. 20.

On 13 February 1992, Messrs Balarajah & Company replied and informed that the matter was a subject matter of a High Court trial – an averment as seen at p. 37 of exh. "CKC 9" of encl. 20.

On 21 December 1992, the plaintiff once again lodged another private caveat *vide* presentation no: 9993 jilid 706, folio 49 on the said land as can be seen in exh. "CKC 8" of encl. 20.

On 2 January 1993, Messrs Leng & Co wrote again to Messrs Balarajah & Company to enquire as to the status of the said action. This can be seen at p. 38 of exh. "CKC 9" of encl. 20.

On 5 January 1993, Messrs Balarajah & Company replied and informed that they are awaiting for a date to be fixed by the court and this can be seen at p. 39 of exh. "CKC 9" of encl. 20.

On 15 February 1994, Messrs Leng & Co wrote again to Messrs Balarajah & Company to enquire as to whether the court has fixed a hearing date and this enquiry is reflected at p. 41 of exh. "CKC 9" of encl. 20.

On 17 February 1994, Messrs Balarajah & Company informed that the said action was fixed for hearing on 28 February 1994 and 1 March 1994. This can be seen at p. 42 of exh. "CKC 9" of encl. 20.

On 2 March 1994, Messrs Leng & Co wrote to Messrs Balarajah & Company and requested to be kept informed once the judgment of the said action is delivered as can be seen at p. 43 of exh. "CKC 9" of encl. 20.

On 10 May 1994, Messrs Balarajah & Company conveyed the message that the court has not fixed a date for the delivery of the judgment of the said action – an averment that can be distilled from p. 44 of exh. "CKC 9" of encl. 20.

On 30 July 1994, Messrs Leng & Co wrote once again to Messrs Balarajah & Company requesting to be informed of the outcome of the said action as can be seen at p. 45 of exh. "CKC 9" of encl. 20.

On 1 August 1994, Messrs Balarajah & Company replied that they will inform Messrs Leng & Co as soon as the date for the delivery of the judgment has been fixed by the court – an averment that can be seen at p. 46 of exh. "CKC 9" of encl. 20.

On 10 August 1995, Messrs Leng & Co sent a letter to Messrs Balarajah & Company enquiring whether the vendors are proceeding with the subdivision of the said land pursuant to the agreement dated 11 April 1976. This piece of evidence can be distilled at p. 47 of exh. "CKC 10" of encl. 20.

Again on 10 August 1995, Messrs Balarajah & Company replied that if the plaintiff purchased the portion of the said land from Revathy, he will have to pursue his claim against Revathy. This piece of evidence is supported by reference to p. 48 of exh. "CKC 10" of encl. 20.

On 16 August 1995, Messrs Leng & Co wrote to Messrs Balarajah & Company relaying the message that the plaintiff had bought the portion of the said land from the vendors as can be seen at p. 49 of exh. "CKC 10" of encl. 20.

a On 17 August 1995, Messrs Balarajah & Company replied and requested Messrs Leng & Co to liaise with Messrs Tam Cheng Yau, Tan & Co as seen at p. 50 of exh. "CKC 10" of encl. 20.

On 22 August 1995, Messrs Leng & Co wrote to Messrs Tam Cheng Yau, Tan & Co requesting, *inter alia*, whether the vendors are willing to fulfil their *b* obligations under the agreement dated 11 April 1976. This can clearly be seen at p. 51 of exh. "CKC 10" of encl. 20.

On 7 September 1995, Messrs Tam Cheng Yau, Tan & Co replied and informed Messrs Leng & Co that they only acted for the vendors in the payout to sub-lot purchasers on an *ex gratia* basis as can be seen at p. 53 of exh. *c* "CKC 10" of encl. 20.

On 10 September 1995, Messrs Leng & Co wrote to Messrs Balarajah & Company enquiring as to whether they are still acting for the vendors. This averment can be seen at p. 54 of exh. "CKC 10" of encl. 20.

d On 19 September 1995, Messrs Balarajah & Company replied to Mesrs Leng & Co and told them to refer to Messrs Tam Cheng Yau, Tan & Co for a without prejudice disposal of the matter as can be seen at p. 55 of exh. "CKC 10" of encl. 20.

On 22 September 1995, Messrs Leng & Co wrote to Messrs Tam Cheng Yau, *e* Tan & Co enquiring the latter whether they are still ready and willing to perform their obligations under the agreement dated 11 April 1976 and for this piece of evidence reference to p. 56 of exh. "CKC 10" of encl. 20 is recommended.

f On 4 October 1995, Messrs Leng & Co again wrote to Messrs Tam Cheng Yau, Tan & Co enquiring whether they have secured the vendors' instructions on the agreement dated 11 April 1976 as can be seen at p. 87 of exh. "CKC 10" of encl. 20.

On 14 March 1996, Messrs Leng & Co wrote to the vendors individually and *g* gave each and every one of them fourteen days notice to perform the terms and conditions of the agreement dated 11 April 1976 – an averment that can be seen at p. 58 of exh. "CKC 11" of encl. 20.

On 2 April 1996, Messrs Balarajah & Company replied and stated categorically that the plaintiff's rights and remedies under the agreement dated 11 April *h* 1976 have been extinguished through effluxion of time – an averment as seen at p. 61 of exh. "CKC 12" of encl. 20.

On 10 April 1996, Messrs Leng & Co replied and pointed out that the plaintiff's cause of action only arose when the vendors indicated their intention to repudiate the agreement dated 11 April 1976 for the first time through the *i* letter from Messrs Balarajah & Company dated 2 April 1996 as can be seen at p. 62 of exh. "CKC 13" of encl. 20.

On 7 May 1996, the plaintiff filed the writ of summons and the statement of claim in encl. 2.

On 18 June 1996, the plaintiff filed the summons in chambers for specific performance under O. 81 of the Rules of the High Court 1980 ("RHC") as seen in encl. 8.

On 3 July 1996, the second and third defendants filed the summons in chambers to strike out the writ of summons as it did not disclose any reasonable cause of action under O. 18 r. 19(1)(a) of the RHC as per encl. 15.

I have endeavoured to set out the chronological events of the case so as to gain an insight and perspective of the whole case. I will now examine encls. 15 and 8 in that order.

Striking Out As Per Enclosure 15

Reliance was placed on O. 18 r. 19(1)(a) of the RHC where the court ought not to have regard to any affidavit evidence to determine the issue of striking out. Reference need only be made to the statement of claim particularly on the crucial question as to whether the statement of claim discloses a reasonable cause of action (*Ibrahim bin Mohamad v. Ketua Polis Daerah Johor Bahru & Ors* [1996] 5 MLJ 15 and the cases cited therein including the Federal Court decision of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226). That being the case, it now falls on me to examine the amended statement of claim as seen in encl. 44 and I need only to reproduce certain parts of that amended statement of claim:

> 6. Melalui satu perjanjian bertarikh 11 April 1976 ("Perjanjian tersebut") yang ditandatangani di antara Plaintif dan Si Mati tersebut dan Defendan Kedua dan Defendan Ketiga, Plaintif telah bersetuju membeli daripada Si Mati tersebut dan Defendan Kedua dan Defendan Ketiga tanah seluas lebih kurang 5,000 kaki persegi yang dikenali sebagai "Private Lot No. 216" yang belum dipecahbahagi dan terkandung dalam Agricultural Lease No. 305 Lot No. 2883, Mukim Pulai ("Tanah tersebut") untuk harga sebanyak RM5,000.00. Private Lot No. 216 kemudiannya telah ditukar kepada Private Lot No. 220.
>
> 9. Plaintif telah membuat kesemua pembayaran yang perlu dibayar di bawah Perjanjian tersebut seperti berikut:
>
> (a) RM4,500.00 seperti dalam Fasal 2(i) Perjanjian tersebut; dan
>
> (b) RM500.00 seperti dalam Fasal 5 Perjanjian tersebut.
>
> 12. Melalui surat bertarikh 15.10.1984, Peguam Si Mati tersebut dan Defendan Kedua dan Defendan Ketiga pada masa itu, iaitu Tetuan A.K.J. D'Cruz & Co ("Peguam Pertama Defendan") telah memberitahu peguam Plaintif dahulu, Tetuan A.L. Looi ("Peguam Plaintif Terdahulu") bahawa Kaveat Pertama mestilah ditarik balik atau persetujuan diberi oleh pengkaveat untuk membolehkan permohonan mengubah kategori dan memecahbahagi Tanah-tanah berkenaan dilakukan.

13. Berdasarkan akujanji dari Si Mati tersebut dan Defendan Kedua dan Defendan Ketiga melalui Peguam Pertama Defendan untuk meyerahkan surat hakmilik Tanah tersebut setelah diperolehi, maka Plaintif pun pada 14.3.1985 memberi persetujuan kepada Si Mati tersebut dan defendan Kedua dan Defendan Ketiga dan Syarikat tersebut untuk membuat permohonan bagi memecahbahagi dan mengubah kategori Tanah-tanah berkenaan. Justeru, Kaveat Pertama juga ditarik balik.

14. Melalui surat bertarikh 1.10.1985, Peguam Plaintif Terdahulu telah diberitahu oleh peguam Si Mati tersebut dan Defendan Kedua dan Defendan Ketiga yang baru, Tetuan Balarajah & Co ("Peguam Kedua Defendan") bahawa Si Mati tersebut dan Defendan Kedua dan Defendan Ketiga telah memfailkan Saman Pemula No. 507-85 ("Kes tersebut") terhadap Syarikat tersebut *inter alia* bagi satu deklarasi bahawa Perjanjian Usahasama tersebut telah luput dengan perjalanan masa ('effluxion of time').

16. Memandangkan terdapat pertikaian di antara Si Mati tersebut dan Defendan Kedua dan defendan Ketiga dan Syarikat tersebut, Plaintif telah pada 29.12.1986 memfailkan semula kaveat untuk menjaga hak dan kepentingannya ke atas Tanah tersebut ('Kaveat Kedua').

19. Pada pertengahan tahun 1995, Peguam Plaintif telah mendapat tahu selepas membaca laporan Kes tersebut di dalam All Malaysian Reports bahawa keputusan kes tersebut telah diberikan dan Perjanjian Usahasama tersebut telah diisytiharkan luput kerana perjalanan masa ('lapse by effluxion of time').

and these averments were not denied by the defendants at all. The statement of defence of the second and third defendants in encl. 10 showed that there were issues that needed to go for trial. Of significance would be paras. 5 to 12 of that statement of defence which were worded in these words:

5. Perenggan 5 adalah tidak betul dan Defendan-defendan mengkehendaki Plaintif untuk membuktikan perkara tersebut dengan bukti-bukti yang kukuh.

6. Defendan-defendan menyatakan dan menegaskan bahawa mereka telah didaftarkan sebagai tuan punya tanah seperti yang dinyatakan di dalam perenggan 5 Pernyataan Tuntutan dan seterusnya menyatakan bahawa mereka memegang tanah tersebut tertakluk kepada satu suratikatan amanah (trust deed).

7. Semua kepentingan remedi dan apa-apa jua tindakan yang mana boleh diambil oleh Plaintif bagi dirinya bersangkutan dengan Perjanjian bertarikh 11-4-1976 telah luput melalui peredaran masa.

8. Kepentingan hak dan remedi Plaintif jika ada (yang mana dinafikan) kesemuanya telah dihalang oleh Limitation Act 1953.

9. Perengan 7 dan 8 di dalam Pernyataan Tuntutan adalah dinafikan.

10. Setakat mana perenggan 10 di dalam Pernyataan Tuntutan adalah berkenaan Plaintif menyedari bahawa Perjanjian di antara Defendan-defendan dan Syarikat Revathy Development (M) Sdn Bhd telah diisytiharkan batal dan tidak sah oleh Mahkamah Tinggi dan dalam apa jua perkara pun ia tidak membawa apa-apa akibat kepada Plaintif.

12. Harta yang menjadi perkara pokok (subject matter) di dalam tindakan ini telah pun dijual.

By virtue of O. 18 r. 13 of the RHC, there would be implied admissions if the pleadings are not traversed. A general denial can never constitute sufficient traverse. Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 CA did say that in evaluating affidavit evidence the approach to be adopted would be as follows: where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted. I am constrained to say that the statement of defence of the second and third defendants in encl. 10 as alluded to, showed admissions and denials in that order. Order 18 r. 13 of the RHC states as follows:

(1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.

(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.

(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.

and simply put, the main object of this rule is to bring the parties by their pleadings to an issue that can be adjudicated by the court. It is for the purpose of narrowing down and identifying the definite issues for adjudication and in the process thereof to reduce expense and diminish delay (*Thorp v. Holdsworth* [1876] 3 Ch. D 637). The object of this rule would be fulfilled if each party admits or denies in clear terms every material allegation made against him. An example of how this rule should be interpreted is now appropriate and apt: in an action for the recovery of a debt or a demand in liquidated amount specifying the money's worth, a mere denial by the defendant of the debt in question is wholly inadmissible. Where the facts are not controversial, the parties ought to admit them. If the facts are so plain, it is wise for the

defendant not to deny them (*Lee Conservancy Board v. Button* [1879] 12 Ch. D 383) and if the defendant admits those plain facts, there is no necessity for the defendant to particularise those admissions (*Fox v. H. Wood (Harrow) Ltd* [1963] 2 QB 601, [1962] 3 All ER 1100 CA). One may ask: what is the effect of the defendant admitting the facts as pleaded in the statement of claim? The trial would be shortened as no evidence would be led in reference to those admitted facts (*Pioneer Plastic Containers Ltd v. Commissioner of Customs and Excise* [1967] Ch. 597, [1967] 1 All ER 1053). Order 18 r. 13(3) of the RHC covers the situation of an implied admission of every allegation of fact in a pleading which is not traversed and in such a situation the value and effect would be the same as if it were an express admission (*Byrd v. Nunn* [1877] 5 Ch D 781; *Green v. Sevin* [1879] 13 Ch. D 589; *Collette v. Goode* [1878] 7 Ch. D 842). The plaintiff must categorically show that the matters in question are clearly pleaded in order to hold the defendant to the admission (*Ash v. Hutchinson & Co (Publishers)* [1936] Ch. 489, 503). A traverse can either be made by a denial or non-admission and it can be done expressly or by necessary implication. Thus, a refusal to admit must be regarded as a denial (*Thorp v. Holdsworth* [1876] 3 Ch. D 637, at p. 640; and *Smith v. Gamlen* [1881] WN 110). The phrase: "defendant puts plaintiff to proof" is said to be an insufficient denial (*Harris v. Gamble* [1878] 7 Ch. D 877). Equally impotent is the phrase: "defendants do not admit correctness" and it is held to be an insufficient denial (*Rutter v. Tregent* [1879] 12 Ch. D 758). In short, traverse must be very specific in nature and not made in general terms.

In the statement of defence as per encl. 10 it was averred that the said land was held by them and governed by the concept of trust deed. Miss Goh Mey Foon, learned counsel for the plaintiff, used the issue of a trust deed as a leverage and argued that the plaintiff's statement of claim ought not to be struck off as it was not a plain and obvious case. Indeed that would be the correct appraisal of the law on striking out. Gunn Chit Tuan J (as he then was) in *Veetak Enterprise Sdn Bhd v. The Kuala Lumpur Finance Bhd* [1987] 1 MLJ 407 echoed the same sentiments when his Lordship said at p. 411 of the report:

> The law concerning the exercise of powers under Order 18 rule 19 is clear and settled. It is only in plain and obvious cases that recourse can be had to the summary process under that rule, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33, rule 2 (*Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105, 113, per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, 91). It cannot be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action, and, on an application to strike out the Statement of Claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (*Wenlock v. Moloney* [1965] 1 WLR 1238, [1965] 2 All ER 871 CA).

Earlier on in 1978, Syed Agil Barakbah J (as he then was) in *Abu Bakar bin Haji Yusuf v. Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78 crystallised the law in these words (see p. 79 of the report):

> It is only in plain and obvious cases that recourse should be had to this summary procedure. The mere fact that the case is weak and unlikely to succeed is no ground for striking out a pleading.

In my judgment, to say that the statement of claim disclosed no reasonable cause of action as suggested by Mr. Mohd. Azuan bin Abdul Rahman, learned counsel for the defendants, would be an understatement of the year. The court has immense power, inherent and by statute, to simply dismiss an action summarily. But this power is certainly a drastic and an overpowering power (*Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1; and *Tengku Jaafar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156) and the courts have been very weary and would only strike out a claim in plain and obvious cases and especially where the claim is obviously unsustainable on the face of it (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp. Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, SC; *Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors* [1997] 2 CLJ 406; [1997] 2 MLJ 11, CA; *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565, FC; *Yeo Siew Kiow v. Nyo Chu Alang & Yang Lain* [1997] 5 MLJ 313 which dutifully followed *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd & Ors* [1996] 1 CLJ 257; [1996] 1 MLJ 309; and *Tan Keat Seng, Kitson v. Kerajaan Malaysia* [1996] 2 CLJ 722; [1996] 1 MLJ 454). What constitutes "plain and obvious" varies from case to case. It is an objective standard. The court may even strike out a claim after a prolonged, elaborate and deliberate hearing and be satisfied that there is no cause of action (*Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661 at 679). An action which contains a point of law, like the present case, should not be struck off in limine (*Oh Theresa v. Sia Hok Chai* [1992] 1 MLJ 215). In determining whether a statement of claim discloses no reasonable cause of action, the court must look at the prevailing state of affairs at the date at which the action is filed (*Gasing Heights Sdn Bhd v. Aloyah bte Abd Rahman & Ors* [1996] 3 CLJ 695; [1996] 3 MLJ 259 CA) and no evidence is admissible to strike out on this ground (O. 18 r. 19(2) of the RHC); and *Zakaria bin Mohamed Esa v. Dato Abdul Aziz bin Ahmad & Ors* [1985] 2 MLJ 222). That being the case, affidavit evidence is also inadmissible (*S. Manickam & Ors v. Ismail bin Mohamed & Ors* [1997] 2 MLJ 90; *Ibrahim bin Mohamad v. Ketua Polis Daerah Johor Bahru & Ors* [1996] 5 MLJ 15; *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113 FC; *Shaik Zolkiffly bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v. Majlis Agama Islam Pulau Pinang dan Seberang Perai*

[1997] 4 CLJ 70; [1997] 3 MLJ 281; *Paul Law Ung Hua & Anor v. Hong Wei Organisation Sdn Bhd* [1996] 4 MLJ 489; and *Hii Teng Tuong, Alphonsus v. Lok Min Wah & Ors* [1995] 4 MLJ 259). What the court needs do is simply to consider the statement of claim that is sought to be struck out and the relevant facts to determine whether a *prima facie* cause of action has been made out: *Peck v. Russell* [1923] 4 FMSLR 32. Having perused through the statement of claim, I certainly cannot subscribe to the argument that it should be struck out on the ground that there was no reasonable cause of action disclosed therein. On the contrary, there were materials to show that there were reasonable cause of actions in the statement of claim.

On the issue of limitation, I need to refer to s. 9(1) of the Limitation Act 1953 (Act 254) which enacts as follows:

> (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

The statement of defence of the second and third defendants brought forth the issue of limitation. To recapitulate on the facts, I need to briefly state that the plaintiff knew about the joint venture between the vendors and Revathy and the plaintiff had acted prudently by lodging a private caveat on 6 May 1982 on the said land. It must be recalled that that joint venture took place on 14 November 1981. Soon after the plaintiff had lodged that private caveat, the vendors' solicitors wrote to the plaintiff's solicitors seeking the consent of the plaintiff to remove that private caveat in order to facilitate the conversion and subdivision. The letter from Messrs AKJ D'Cruz & Co, the former solicitors of the vendors, was an express undertaking that was given to the plaintiff in that it sought to protect the plaintiff's interest. Based on this undertaking, the plaintiff became magnanimous and gave the consent for conversion, subdivision and forthwith withdrew the private caveat. Later, when the plaintiff was informed that the vendors were seeking a declaration to annul the joint venture agreement, the plaintiff had no alternative but to wait for the outcome of the decision by the court in regard to the said action. It must be stressed that throughout the enquiries made with the vendors' solicitors, the plaintiff was never informed that the vendors would not perform their undertaking to apply for the conversion and subdivision. The first indication came on 2 April 1996 when Messrs Balarajah & Company replied that the plaintiff's rights and remedies have been extinguished by effluxion of time. The plaintiff's stand, and rightly so, was that the Limitation Act 1953 (Act 254) did not apply because the cause of action only arose on the date when there "is any infringement or threat of infringement of the plaintiff's rights under the sale and purchase agreement." The Federal Court speaking through Gill FJ in *Nasri v. Mesah* [1971] 1 MLJ 32, 34 held that time begins to run for the purposes of limitation from the date of any infringement or threat of

infringement. His Lordship was also of the view that a cause of action on a contract accrues on the date of the breach and in the case of actions founded on contract, time runs from the breach. This was what his Lordship said:

> In *Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610, 617, Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v. Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo's* case (*Bolo v. Koklan & Ors* LR 57 IA 325)). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

Ali FJ in *Tan Swee Lan v. Engku Nik binti Engku Muda & Ors* [1973] 2 MLJ 187 FC aptly said at p. 188 of the report:

> On the defence of limitation the question which arose was whether the period of 12 years ran from the date of the agreement, ie, April 12, 1958, as contended by the respondents, or, as contended by the appellant, from the date when the respondents threatened to infringe his right by saying in their letter of March 16, 1970 that they refused to take any steps to effect the transfer of the land. Section 9 (1) of the Limitation Ordinance, 1953 which governs this question is in these terms:
>
> > 9(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.
>
> In the Privy Council case of *Bolo v. Kokland & Ors* LR 57 IA 325, AIR [1930] PC 270 it was stated:
>
> > There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.
>
> This particular passage has influenced the decision of the Federal Court in *Ng Moh v. Tan Bok Kim & Anor* [1969] 1 MLJ 46 which was later followed in *Nasri v. Mesah* [1971] 1 MLJ 32. On these authorities the appellant's contention would seem to be correct.

Factually, the vendors remained silent and they were only stirred to activity on 2 April 1996 when their solicitors Messrs Balarajah & Company conveyed the message that the agreement dated 11 April 1976 was extinguished by effluxion of time. On the strength of the authorities cited above, the submission

by Mr. Mohd. Azuan bin Abdul Rahman for the vendors to the effect that twelve years had started from the date wherein the agreement was dated, namely, 11 April 1976 must fall like a deck of cards.

Undaunted, a second prong attack was launched. It was in the form of a submission to this effect: that the cause of action arose when the plaintiff knew that the vendors had entered into a joint venture agreement with Revathy on 14 April 1981 – the very date wherein the joint venture agreement was entered. But with respect, this argument runs on thin ice. There was no breach of the agreement dated 11 April 1976 when the joint venture agreement was entered between the vendors and Revathy because under that joint venture agreement Revathy agreed to apply for approval for conversion and subdivision. The scenario would be different if in the joint venture agreement the portion of the said land purchased by the plaintiff would be affected by being sold to a third party or taken over by Revathy.

For the reasons adumbrated above, I have no hesitation in dismissing encl. 15 with costs.

Specific Performance As Per Enclosure 8

This would relate to the agreement dated 11 April 1976. Under that agreement there was no time frame within which the approval for conversion and subdivision should be obtained. The plaintiff had dutifully paid all the monies due under the agreement leaving a paltry sum of RM500 which was payable upon the issuance of the separate document of title. The purchase price for the portion of the said land, free from encumbrances, was RM5,000 only. Now, cl. 14 of the agreement gave the plaintiff the right to seek specific performance of the agreement or alternatively to seek a refund and payment of an equivalent sum as agreed damages. Obviously the plaintiff here sought for specific performance of the agreement. For a start it would be appropriate to reproduce cl. 14 of the agreement:

> In the event of the vendors refusing to complete the sale in the manner as aforesaid otherwise than as set out in clause 15 below, then the vendors shall refund all sums of money paid by the Purchaser under this agreement and in addition thereto shall pay an equivalent sum of money by way of agreed damages to the Purchaser and this agreement shall thereupon be terminated and be null and void and of no effect whatsoever. Provided however the Purchaser shall be entitled in the alternative to specific performance of this agreement.

The relevant statute to refer to would be the Specific Relief Act 1950 and this very Act contains elaborate provisions governing the remedy of specific performance. For instance, s. 21 of the Specific Relief Act 1950 enacts that the court has a discretion to refuse specific performance where the granting of it would cause undue hardship to the defendant. But what is 'hardship' would vary from case to case. In *Venkatachalam Chettiar v. Arunasalam Chettiar* [1953] MLJ 234 the court there held that a bargain that turned out

worse than expected cannot constitute hardship. It must not be forgotten that the discretion to refuse specific performance is said not to be "an arbitrary ... discretion but one to be governed as far as possible by fixed rules and principles" (*Lamare v. Dixon* [1873] LR 6 HL 414, 423). Section 11(2) of the Specific Relief Act 1950 enacts that specific performance may be granted in respect of agreements relating to land transactions where there is a presumption that the breach of a contract to transfer immovable property cannot be adequately relieved by money (*Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor* [1982] 2 MLJ 92 PC). In regard to executory contracts, specific performance too may be granted (*Mohamed v. Ho Wai* [1961] MLJ 7). But if damages would provide an adequate remedy, the court will exercise its discretion not to grant specific performance (s. 20(1)(a) of the Specific Relief Act 1950; *Yeo Long Seng v. Lucky Park (Pte) Limited* [1971] 1 MLJ 20). Section 20(1)(c) of the Specific Relief Act 1950 enacts that specific performance will be refused where the terms of the contract are uncertain (*Lim Nyuk Chan v. Wong Sz Tsin* [1964] MLJ 200). Specific performance too would be refused in the following situations:

(1) where there has been delay in bringing the action (*Itam binti Saad v. Chik binti Abdullah* [1974] 2 MLJ 53);

(2) where there is evidence of fraud (*Siah bt Tengku Nong* [1964] MLJ 431; and

(3) where it requires the constant supervision of the court (*Lee Sau Kong v. Leow Cheng Chiang* [1961] MLJ 17).

The court in *Lee Hoy & Anor v. Chen Chi* [1971] 1 MLJ 76 relied on the Privy Council case of *Ardeshir Mamma v. Flora Sassoon* AIR [1928] PC 208 as a leverage and held that the court can only grant compensation under s. 18 of the Specific Relief Act 1950 where specific performance was pleaded. Section 26 of the Specific Relief Act 1950 enacts that specific performance may be granted against parties and persons claiming under a subsequent title: *Ong Chat Pang & Anor v. Valiappa Chettiar* [1971] 1 MLJ 224. Finally, it is germane to point out that under s. 19 of the Specific Relief Act 1950, liquidation of damages is not a bar to specific performance (*Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor (supra)*).

Specific performance is a decree by the court which constrains a contracting party to do what he has promised to do. It is a relief that is purely equitable in origin and is a classic example of the maxim that equity acts *in personam*. The normal remedy for breach of contract has all along been for the recovery of damages. In certain cases recovery of damages afford sufficient and adequate reparation. Thus, a contract for the sale of goods which is easily procurable elsewhere and a contract for the purchase of stocks and shares which is also easily procurable elsewhere because of the free market system

are two prominent examples of recovery of damages for breach of a contract. But in many instances involving purchases of pieces of lands – the present case is a good example, where the vendors drag their feet in conveying the land that has been sold, an award of damages would not be sufficient as it would defeat the just and reasonable expectations of the plaintiff. In *Flint v. Brandon* [1803] 8 Ves 159, the court refused specific performance of the defendant's promise to make good a gravel pit which he had quarried and the Master of the Rolls explained that refusal in the following words:

> This court does not profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for courts of equity to interfere ... In the present case complete justice can be done at law. The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which by the covenant it ought to be.

All things being equal, the decree of specific performance is a discretionary remedy. Lord Parker in *Stickney v. Keeble* [1915] AC 386 at 419 aptly said:

> Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do.

So much for the law. Now to the heart of the matter.

Mr. Mohd Azuan bin Abdul Rahman submitted that since there was a provision in the agreement for liquidated damages the plaintiff was not entitled to specific performance. That was not a novel submission. The answer can be found in the passages of the following authorities:

(1) In *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155, 157, Lee Hun Hoe CJ (Borneo) succinctly said:

> In dismissing the appeal the Privy Council held, *inter alia*, that the fact that there was an alternative claim for damages, in an action by the purchaser for specific performance of a contract for the sale of land, could not be a fact relevant to the exercise of the discretion by the learned judge and the Federal Court was entitled to exercise its discretion and was correct in reversing the decision of the judge and ordering specific performance. As Lord Russell of Killowen in delivering the judgment of the Board at p. 94 questioned the refusal of the learned judge to grant specific performance just because the learned judge thought a sum was fixed in consideration of the purchase.

(2) In *Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor* [1982] 2 MLJ 92, Lord Russell of Killowen at p. 93 of the report remarked:

> The claim for relief was for specific performance of the agreement and further or alternatively damages for breach of contract – a perfectly usual claim which cannot be taken as indicating an alternative equally acceptable to the plaintiff.

(3) In *Meng Leong Development Pte Ltd v. Jip Hong Trading Co. Pte Ltd* [1983] 2 MLJ 25, the Singapore Court of Appeal at p. 26 observed:

> In our view, an order for specific performance was the most appropriate remedy. All the equities were in favour of the respondents. To have ordered damages would amount to taking away the proprietary rights of the respondents in favour of the two brothers whose rights must be subordinated to the superior claims of the respondents.

The case of *Hassan v. Ismail* [1970] 1 MLJ 210, a decision of Suffian FJ with the concurrence of Azmi LP should be cited as that case would certainly favour the plaintiff in seeking this court's discretionary power to order specific performance and to order the vendors in the present case to apply for conversion and subdivision. In that case, the defendant sold a portion of the land 60 feet wide and 70 feet long to the plaintiff for $400. The defendant failed to subdivide the land and transfer the portion to the plaintiff. The plaintiff then sued to compel the defendant to do so. Suffian FJ observed at p. 211 of the report:

> If the agreement were construed as an undertaking by the defendant to apply for subdivision before the portion is transferred by him to the plaintiff (as was, I think, rightly done by the learned trial judge), then it did not offend against section 37A of the Kelantan Land Enactment – because the prohibition under that section was not absolute. As is pointed out by Mr. Jegathesan for the plaintiff/respondent, the defendant could have applied under subsection (ii) of that section for exemption from the prohibition imposed by subsection (i), and that he never did.

The vendors – particularly the second and third defendants in their defence at para. 25 of encl. 10 averred that the said land had been sold to third parties and both the second and third defendants were said to be bare trustees. The third defendant deposed an affidavit in encl. 31 for himself as well as the third defendant and he too categorically stated that the first defendant had died and at para. 23 thereof, the third defendant averred that they were bare trustees – referring no doubt to the second and third defendants. It was also averred in para. 25 of encl. 10 that both the second and third defendants had been paid for the sale of the said land to third parties and they too had handed vacant possession. With respect, the averments at para. 25 of encl. 10 were devoid of merit as they were bare allegations with no particulars of the date of the sale to the third parties, no particulars of the identities of the third parties, no particulars in regard to the purchase price and neither were there particulars of the completion date. Of crucial importance there was no endorsement of trusteeship on the title, a requirement under s. 344 of the National Land Code 1965. In *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad (formerly known as Time Engineering Sdn Bhd)* [1996] 2 AMR 1537 FC, the Federal Court held that there must be a payment of the full purchase price and a valid registrable transfer of the said land before a bare trusteeship can be said to be in existence. In *Ong Chat Pang & Anor*

v. Valiappa Chettiar [1971] 1 MLJ 224 FC, Gill FJ too echoed the same sentiments. In the present case, there cannot be a valid and registrable transfer of the said land to the third parties because of the existence of the private caveat. Even if the third parties were interested in purchasing the said land, it must be subject to the rule of equity which would certainly lean heavily in favour of the plaintiff.

An argument was advanced by Miss Goh Mey Foon for the plaintiff to the effect that the conduct of the vendors in keeping silence had led the plaintiff to believe that the vendors were going to perform their obligations to convert and sub-divide on the master title (*Sim Chio Huat v. Wong Ted Fui* [1983] 1 MLJ 151 FC). A little repetition of the facts of the present case would do no harm.

On 15 October 1984, Messrs AKJ D'Cruz & Co asked Messrs A.L. Looi to remove the caveat.

On 1 October 1985, Messrs Balarajah & Company wrote to Messrs A.L. Looi to inform them that they have filed an originating summons no: 507 of 1985.

On 1 August 1994, Messrs Balarajah & Company replied that they will inform Messrs Leng & Co as soon as the date for delivery of judgment was fixed.

On 17 August 1995, Messrs Balarajah & Company replied and asked Messrs Leng & Co to liaise with Messrs Tam Cheng Yau, Tan & Co.

On 2 August 1996, Messrs Balarajah & Company replied that the agreement had been extinguished through effluxion of time.

These salient facts would give rise to an estoppel against the vendors in favour of the plaintiff (*KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 1 MLJ 233 CA; *Teh Poh Wah v. Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 CA; *Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206 CA; and *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 FC).

Going on an uphill task, Mr. Mohd Azuan bin Abdul Rahman submitted that the plaintiff had slept on his rights and had failed to take an action with utmost promptitude. The short answer can be distilled from the judgment of Edgar Joseph Jr. J (as he then was) in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202. In that case, his Lordship in a long refined judgment said at p. 238 of the report:

> The defence of laches is only allowed where there is no statutory bar: *14 Halsbury's Laws of England* (3rd Ed) paragraph 1181.
>
> Section 32 of the Limitation Act 1953 (Revised 1981), provides that 'nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise'.

There were other inconsequential issues that were raised by Mr. Mohd Azuan bin Abdul Rahman which did not merit reference at all. They were so inconsequential that it would not affect the substratum of encl. 8.

The outcome was inevitable. Enclosure 8 must be allowed with costs.

Enclosure 65 – Application For A Stay

I dismissed encl. 65 with costs for the following reasons:

(1) an appeal would not operate as a stay of execution (*Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353; [1995] 3 MLJ 224);

(2) this court will be hesitant and will not deprive a successful litigant the fruits of his litigation (*Wu Shu Chen's* case *(supra)*);

(3) an allegation that there has been a misdirection by me would not be sufficient to bring it within the special circumstances rule (*Monk v. Bartram* [1891] 1 QB 346); and

(4) no special circumstances were shown to support the application for a stay and for this purpose reference to *Halsbury's Laws of England*, 3rd edition, vol. 16 at p. 35 should be ideal and there the following passage appears:

> The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

It must be recalled that under the agreement dated 11 April 1976 there was no time limit within which the vendors must procure the conversion and subdivision. Even if the land office delayed the application for conversion and subdivision, the vendors would not be prejudiced. It was also argued that the said land had been sold to third parties and it was pending registration but alas this point was ventilated in the course of hearing the application in encl. 8 and it fell flat to the ground. At any rate, there was no evidence to show as to why the sale of the said land to the third parties should take priority over the plaintiff who had purchased the portion of the said land earlier in point of time. The merits of the appeal which Mr. Mohd. Azuan bin Abdul Rahman emphasised can never constitute a ground for a stay.